MARTHA COAKLEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
OFFICE OF THE SENATE PRESIDENT

Therese Murray
President

May 24, 2013

The Honorable Dianne Feinstein
Chair, Senate Appropriations Subcommittee
on Energy & Water Development
331 Hart Senate Office Bldg.
Washington, DC 20510

The Honorable Ron Wyden
Chair, Senate Committee on Energy &
Natural Resources
221 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Lamar Alexander
Ranking Member, Senate Appropriations
Subcommittee on Energy & Water
Development
455 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Lisa Murkowski
Ranking Member, Senate Committee on
Energy & Natural Resources
709 Hart Senate Building
Washington, DC 20510

Re: Support for the Nuclear Waste Administration Act of 2013

Dear Senators Feinstein, Wyden, Alexander, and Murkowski:

We urge you to pass the Nuclear Waste Administration Act of 2013 (NWAA), subject to the comments we provide below.

The federal government has long had an obligation to develop short and long term solutions to the current on-site storage of nuclear waste in facilities in Massachusetts and other states. Its failure to act has cost taxpayers and we believe poses great risks to public safety and the environment. We urge swift action to address this issue on behalf of our constituents in Massachusetts and those across the country.

Since 2006, the Commonwealth of Massachusetts, through administrative proceedings and proposed rulemakings, and before the courts, has urged the Nuclear Regulatory Commission (NRC) to address these significant risks. In recent years, the Commonwealth has addressed risks related to onsite storage of nuclear waste in connection with the NRC's relicensing proceedings for the Pilgrim nuclear power plant, located in Plymouth, Massachusetts, and the Vermont

Yankee nuclear power plant, located less than ten miles from the Massachusetts border in Vernon, Vermont.[1]

When Pilgrim and Vermont Yankee, and other reactors, were licensed by the NRC in the 1970s, regulators assumed that the spent fuel would be transferred offsite to a permanent disposal facility. More than forty years later, a permanent repository still has not been constructed. As a consequence, spent fuel continues to be stockpiled ever more densely at individual plant sites, primarily in exposed spent fuel pools, thereby increasing the risk of core melt or catastrophic fire by terrorist attack, as acknowledged in a 2006 National Academy of Sciences Report,[2] or by earthquake and other natural disasters, as occurred (core melt) at the Fukushima Daiichi site in Japan involving four nuclear power plants.[3] Yet, as the United States Court of Appeals for the District of Columbia recently found, the NRC still has not adequately addressed the risks of onsite storage of spent nuclear fuel at civilian reactors.[4] We therefore urge the Congress to act.

Pursuant to the Nuclear Waste Policy Act of 1982 (NWPA), as amended by the NWPA Amendments Act of 1987, the Department of Energy (DOE) entered into Standard Contracts with commercial reactor licensees to take title to spent fuel and high level waste beginning January 31, 1998, in exchange for payments of fees to the Nuclear Waste Fund. Because the DOE failed to develop the repository contemplated by the NWPA, the federal government has been in partial breach of the Standard Contracts. This breach has led to scores of suits against the federal government to recover damages resulting from DOE's failure to remove spent fuel and Greater Than Class C (GTCC) waste.

Since 1998, ratepayers have borne the additional costs of re-racking wet storage pools to create more on-site storage, and subsequently, the costs of constructing and operating safer dry storage in Independent Spent Fuel Storage Installations (ISFSI) at the sites of three decommissioned Yankee nuclear plants in New England. While we are pleased that the Yankee companies were recently able to recover nearly $160 million for the benefit of ratepayers in the first phase of litigation for damages incurred between 1998 and 2002, this took 14 years of litigation as a result of the federal government's strategy of opposing this recovery and filing costly appeals. Until there is a permanent solution to remove the spent fuel and GTCC waste, this litigation will continue in subsequent phases, because the courts have ruled that the Standard Contract holders may only recover damages as they are incurred. The costs, which the American taxpayer will ultimately bear, continue to mount due to heightened security concerns which have recently increased the ongoing operating costs for these sites.

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[1] *See e.g. Commonwealth of Massachusetts v. United States Nuclear Regulatory Commission*, 522 F. 3d 115 (1st Cir. 2008).

[2] NAS Committee on the Safety and Security of Commercial Spent Nuclear Fuel Storage, *Safety and Security of Commercial Spent Nuclear Fuel Storage* (The National Academies Press: 2006) at 36, 57.

[3] *See* U.S. Nuclear Regulatory Commission Task Force, Near-Term Review of Insights from the Fukushima Dai-ichi Accident: Recommendations for Enhancing Reactor Safety in the 21st Century (July 2011) at 9.

[4] *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012); *see also* NRC Denial of Petitions for Rulemaking, 73 Fed. Reg. at 46,208 and 46,212 (August 8, 2008) (NRC concludes that the environmental impacts of storing spent nuclear fuel onsite at civilian reactors are "small" and those findings "remain valid.").

Because the work to develop a repository at Yucca Mountain came to a halt, the DOE chartered the Blue Ribbon Commission on America's Nuclear Future (Commission) to recommend a strategy for managing the back end of the nuclear fuel cycle. We participated in the Commission's comment process and supported recommendations to develop one or more consolidated interim storage facilities, to prioritize the removal of waste from decommissioned reactor sites, and to implement near term transportation related programs that will be necessary to move the waste to interim storage. On January 26, 2012, the Commission issued a report which is the basis for the various legislative proposals being discussed today.

With respect to the proposed NWAA, we submit the following comments:

Siting Requirements, Section 304

We support the provisions of the NWAA that require the consent of the affected State,[5] meaningful participation by the public,[6] and the right of judicial review.[7] Consistent with this more consensual approach, and the importance of protecting human health and the environment as part of the siting process, we recommend that sections 304(b)(2)(A) and 304(b)(3) be amended expressly to provide for National Environmental Policy Act review.

We support the NWAA's proposed tiered structure for site investigation and site suitability determination. Because the initial determination of suitability for site characterization and the final site suitability determination turn, in significant part, on whether a site comports with the statutory siting guidelines and factors set forth therein, we recommend that the guidelines expressly provide, among the additional factors to be considered, that the Administrator must take into account the extent to which a storage facility would minimize the impact of short and long term nuclear waste storage on human health and the environment.

With regard to the proposed new agency's responsibility to transport nuclear waste, we recommend that the guidelines also provide, among the additional factors to be considered, that the Administrator must also take into account the availability of safe transport routes and modes of transport. Currently, section 304(b) provides that the guidelines for storage facilities shall require the Administrator to take into account "the extent to which a storage facility would . . . (ii) minimize the impacts of transportation and handling of nuclear waste . . ."[8] Making the availability of safe transportation routes and modes an express siting requirement will likely facilitate the siting process, surface concerns earlier, and avoid scenarios in which sites are selected in the absence of sufficient and appropriate transportation infrastructure.

Relationship of Temporary to Permanent Storage, Sections 305, 306

The legislation at section 306 links the siting, construction, and operation of temporary storage facilities to "progress" on a permanent repository. We recommend decoupling development of temporary storage facilities and repositories to avoid placing a further

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[5] *See, e.g.*, section 304(c).
[6] *See, e.g.*, section 304(a).
[7] *See* section 404.
[8] Section 304(b)(2)(C)(ii).

impediment to removal of spent nuclear fuel to offsite temporary storage facilities. It is imperative that Congress promptly address the public safety and environmental concerns associated with the current practice of onsite storage of spent fuel in pools that were never designed to serve as long term storage facilities for nuclear waste. To address this issue in part, We generally support the alternative section 305 concepts suggested by Senator Alexander that would establish separate, but parallel, processes for the siting of temporary storage facilities and a permanent repository, provided both processes remain subject to siting guidelines as noted above, since this may provide opportunities for further streamlining and expediting of the temporary storage siting process.

Transportation of Nuclear Waste, Section 308

Section 308(a)(1) confers upon the Administrator the responsibility for transporting nuclear waste from the site of a contract holder to a storage facility or repository. This section should make clear that the Administrator has an obligation to accept title to spent fuel and GTCC waste delivered by a contract holder using any package that has previously been certified by the NRC. There are a number of vendors that have licensed storage and transportation canister systems which are not compatible with each other. Nuclear plant operators or ISFSI operators may have invested in dry cask systems in reliance on the NRC certification. Clarifying the obligation to accept waste delivered in any such approved package will avoid stranding additional investment and eliminate additional delays and costs of repackaging waste for transportation.

Claims Against the Federal Government, Section 406

Section 406(b) would make settlement of damage claims against the federal government a "condition precedent of the agreement of the Administrator to take title to and store the nuclear waste of the contract holder at a storage facility." Although requiring the federal government to settle damage claims under the Standard Contract in a timely manner rather than opposing and litigating the claims would better serve the public interest, the Commonwealth opposes making the obligation to take title to and store the waste contingent upon resolution of the damage claims under any existing contracts. This provision could confer an advantage on the federal government by effectively requiring contract holders to settle, likely on less beneficial terms and agree to limit future damage claims for the government's continuing breach of contract for failure to begin accepting spent fuel and GTCC waste.

The U.S. Court of Federal Claims has held that utilities cannot recover future damages, because DOE is only in partial breach of the Standard Contract. Utilities must file subsequent claims to recover damages later incurred subject to a six-year statute of limitations. Thus, the existing actions before the court cover only damages incurred within the six years prior to the time the lawsuits were filed. Ratepayers continue to pay for the cost of ISFSIs at the three decommissioned plant sites in New England: Yankee Atomic in Rowe, Massachusetts; Connecticut Yankee in Haddam Neck, Connecticut; and Maine Yankee in Wiscasset, Maine. Massachusetts ratepayers' share of the operating costs currently amounts to approximately $10 million annually. Limiting the federal government's liability for such costs would permanently shift the burden of those continuing costs to consumers.

We appreciate the opportunity to provide comments on the NWAA.

Cordially,

Therese Murray
President
Massachusetts Senate

Martha Coakley
Massachusetts Attorney General